IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted] 787

HICKS-PONDER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

HICKS-PONDER COMPANY,

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v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT COURT

JOHN EDWARD PRICE & ASSOCIATES by John Edward Price and Norman Landa, on behalf of HICKS-PONDER COMPANY, petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the National Labor Relations Board (Appendix A, infra, pp. 1-9) entered January 9, 1969 is reported at 174 NLRB No. 12. The opinion of the United States Court of Appeals for the Fifth Circuit was entered

March 25, 1970 (Appendix B, infra, pp. 1-2) is not officially reported.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered April 29, 1970 (Appendix C, infra, p. 1). The Order denying a rehearing by the United States Court of Appeals for the Fifth Circuit was entered on April 15, 1970 (Appendix D, infra, pp. 1-2). The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED

Whether in rendering its decision enforcing an order of the National Labor Relations Board requiring the reinstatement of and back payment for a certain employee the United States Court of Appeals for the Fifth Circuit departed from, misapprehended, and misapplied the standard of review set forth in § 10(e) of the National Labor Relations Act, 29 U.S.C.A. § 160(e) and § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e) as interpreted by the Supreme Court in *Universal Camera v. N.L.R.B.*, 34 U.S. 474.

STATUTES INVOLVED

The following statutory provisions are set forth:

1. Section 10(e) of the National Labor Relations Act [29 U.S.C.A. Section 160(e)]:

> "The Board shall have power to petition any United States Court of Appeals, or if all of the United States Courts of Appeals to which application may be made are in vacation, any District Court of the United States, within any circuit or district, respectively, wherein the unfair labor

practice in question occurred, or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in Section 2112 of Title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objections shall be excused because of extraordinary circumstances. *The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.* If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be

exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States Court of Appeals if application was made to the District Court as hereinabove provided, and by the Supreme Court of the United States upon Writ of Certiorari or certification as provided in Section 1254 of Title 28." (Emphasis added.)

2. Section 10(e) of the Administrative Procedure Act [5 U.S.C. Section 1009(e)]:

"(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. *In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.*" (Emphasis added.)

STATEMENT

Hicks-Ponder Company (Company), a Texas corporation, is engaged in the manufacture of wearing apparel. It has plants located at El Paso, Texas, Del Rio, Texas, and Yuma,

Arizona. The Yuma plant is the only one involved in these proceedings.

The Southern California Joint Board, Amalgamated Clothing Workers of America, AFL-CIO (Union), commenced its organizational drive of the employees at the Company's Yuma plant in January, 1967. On May 26, 1967 the Union filed a petition for an election (28-RC-1639). The organizational drive culminated with the Union's loss of the election conducted on July 28, 1967. Thereafter on August 4, 1967, the Union filed timely objections to the election. On August 23, 1967, the Union filed unfair labor practice charges against the Company charging it with violations of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (28-CA-1575). Amended charges were filed on August 23, 1967 and November 8, 1967. The latter amended charge dropped the Section 8(a)(5) allegation. On November 9, 1967, the Regional Director issued his report on the objections to the election finding that objections 1, 2, 3, 4 and 6 also alleged unfair labor practices in Case No. 28-CA-1575. The Regional Director, simultaneously with his report, issued an Order consolidating cases and Notice of Hearing. On November 27, 1967 the Board adopted the Regional Director's recommendations.

A hearing was held on February 6, 7, 8 and 9, 1968. The Trial Examiner issued his decision on June 12, 1968, finding that the Company had engaged in certain unfair labor practices. In addition to certain other recommendations, the Trial Examiner recommended that the Company be ordered to offer reinstatement to Josephine Jaime with back pay. The National Labor Relations Board issued its Decision, Order, and Direction of Second Election on January 9, 1969, adopting the Trial Examiner's findings with certain modifications.

On January 13, 1969, the Company filed a Petition for Review of the Order with the United States Court of Appeals for the Fifth Circuit pursuant to Section 10(f) of

the National Labor Relations Act [29 U.S.C.A. Section 160(f)]. On February 28, 1969, the National Labor Relations Board filed its Cross-Application for Enforcement with the same Court. On March 25, 1970 the United States Court of Appeals for the Fifth Circuit rendered its opinion enforcing the Board's Order. On April 29, 1970, the Court entered its Judgment.

The question raised in this Petition deals solely with the alleged discriminatory discharge of Josephine Jamie.

REASON FOR GRANTING THE WRIT

The United States Court of Appeals for the Fifth Circuit in rendering its decision in this matter decided a question of federal law in a way in conflict with the applicable decisions of the Supreme Court as to call for the exercise of the Supreme Court's power of supervision.

A. THAT IN ENFORCING THE BOARD'S ORDER THE LOWER COURT APPLIED THE WRONG CRITERIA FOR THE STANDARD OF JUDICIAL REVIEW IN LABOR BOARD CASES.

The lower Court identified the issue as ". . . whether substantial evidence on the record taken as a whole supports the finding." The Court then said, "Apparently none (of the several witnesses) presented a completely accurate and detached statement of what occurred, but on the basis of the record we are unable to say that the Trial Examiner and the Board in affirming him—made erroneous credibility determinations."

It is apparent that the lower Court in reaching its findings, applied the wrong criteria for judicial review in Labor Board cases in that it, as can be seen, based its decision entirely upon credibility determinations to the exclusion of substantial evidence contained in the entire record. This basis constitutes a departure from, and a misapplication of, the standard set forth in §10(e) of the National Labor Re-

lations Act, 29 U.S.C.A. §160(e) and §1009(e) of the Administrative Procedure Act, 5 U.S.C.A. as interpreted by the Supreme Court in *Universal Camera Corp. v. N.L.R.B.* 340 U.S. 474, to the effect that a reviewing court must determine the substantiality of the evidence on the basis of the record as a whole.

The Trial Examiner in finding that the Company has unlawfully discharged Josephine Jaime in violation of Section 8(a)(3) and (1) of the National Labor Relations Board Act based his decision on two factors: (1) that she was discharged a few days before the election; and (2) that she was discharged for her open advocacy of the union.[1]

The Trial Examiner's finding of unlawful discharge was based solely on these two factors. With regard to these factors the Company would point out the following. There is no evidence in the record that Josephine Jaime ever openly advocated unionism, or that any member of management knew her feelings one way or the other.

Secondly, the documentary evidence (the employee's time card) quite clearly shows that the employee was discharged on August 1, 1967, four days after the election rather than a few days before. Even the General Counsel in its brief to the United States Court of Appeals for the Fifth Circuit recognized this and stated, "The Trial Examiner's decision states that these events (the discharge) occurred on July 24. The Company correctly points out that they could not have occurred until the 26th." This evidence does not go to credibility, but instead is matter contained in the record which detracts from the Board finding and which should have been considered by the Court and was not.

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[1] I am convinced that with the election but a few days away, Respondent was quite eager to seize upon any colorable incident to discourage a favorable vote for the Union. Jaime by her open advocacy of the Union cause at the meeting addressed by Price was an inviting target and was suspended and subsequently discharged for that reason. (TXD Tr. Vol II, pp. 34, 35)

If permitted to stand, the lower Court's decision in this case is sure to have one or both of the following effects:

1. It would replace the standard set forth in *Universal Camera Corp. v. N.L.R.B.* supra with a standard which would allow substantiality of the evidence to be determined solely upon a finding of credibility, irrespective of other evidence; or

2. It would replace the substantiality of evidence standard with a rule which would require that Administrative Board or Agency decisions be upheld whenever their credibility findings can be sustained irrespective of other evidence in the record.

It cannot be said that a finding of witness credibility is synonymous with a finding of substantial evidence on the entire record sufficient to uphold a Board or Agency decision. It is entirely possible for a witness to be found creditable on the one hand and to find on the other that the evidence, when considered on the record as a whole, is not substantial enough to support an Agency or Board decision. It is submitted that substantiality of the evidence on the record considered as whole is much different from and goes much further than merely credibility determinations. The credibility of a witness is only one of several factors which must be considered in determining if there is substantial evidence on the entire record sufficient to sustain a board finding. In addition to credibility the reviewing court must also appraise the conflicting evidence and consider that which detracts or that which confirms. This the lower court failed to do.

In basing its decision solely on credibility, the lower court in effect looked only at evidence which would in and of itself justify the Board's finding without regard for the evidence which was opposed to the Board's view. There can be no doubt that this decision places a severe, unwarranted, and unintended restriction on the standard of judicial review in Labor Board cases and constitutes a radical departure from previous Supreme Court decisions in this area.

If the Supreme Court allows this decision to stand on its present basis it will be condoning a revision to the standard used under the Wagner Act, [Act of July 5, 1935, 20 U.S. C.A. §160(e)] to the effect that the requirement pertaining to judicial review will be met when the reviewing court can find in the record evidence which, when viewed in isolation, substantiates the Board's finding.

Such a standard is repugnant in view of the Supreme Court's holding in *Universal Camera Corp. v. N.L.R.B.* supra ". . . that substantiality be determined in the light of all that the record relevantly presents," and its statement in that case that, "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

In *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, the Supreme Court admonished the United States Court of Appeals for the Fifth Circuit not to lay down a special rule in reinstatement with back pay cases which would require the crediting of the sworn testimony of the employer regarding his motivations for discharge absent any specific circumstances or allegations raising doubts as to its truthfulness. In an effort to abide by this admonition in the case at bar the lower Court went to the opposite extreme in that it looked only at the evidence which would sustain the Board's finding, completely ignoring both the undenied sworn testimony and documentary evidence which went to support Company's motive for discharging the employee, Josephine Jaime. It is to be added that the documentary evidence submitted was not subject to credibility determinations, and in toto supported Petitioner's position. Yet no mention of this evidence was made by the lower Court in handing down its decision.

BY PLACING THIS CASE ON THE SUMMARY CALENDAR, THE LOWER COURT FURTHER DEPARTED FROM THE STANDARD SET FORTH IN UNIVERSAL CAMERA CORP. v. N.L.R.B.

The lower Court in rendering its opinion concluded that oral argument was unnecessary and ordered the case placed on the Summary Calendar. This action had the effect of depriving Petitioner of the opportunity of presenting its case face to face to those judging it. In fact, at no time from complaint to enforcement has the Petitioner had the opportunity to present its case to those who had the power of final judgment. At the Board level the Company could not argue the case orally. The Trial Examiner cannot make a decision, he can only make recommendations to the Board who does the actual judging. The issues in this case are too subtle and difficult to be presented entirely in writing. In order for the Court to have a full understanding, there must be oral argument.

It is submitted that by placing this case on the Summary Calendar the lower court ignored the admonition of the Supreme Court that it assume more responsibility for the reasonableness and fairness of Labor Board decisions and merely became a judicial echo of the Board's conclusions.

CONCLUSION

The United States Court of Appeals for the Fifth Circuit has decided a question of federal law in a way in conflict with applicable Supreme Court decisions as to call for the exercise of the Supreme Court's power of supervision.

In ordering its decision, the lower Court has so departed from and misapplied the standard for judicial review set forth in the National Labor Relations and Administrative Procedure Acts, as to call for intervention by the Supreme Court. For these reasons the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

174 NLRB NO. 12 D-1596
Yuma, Ariz.

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD

HICKS-PONDER COMPANY

and Case 28-CA-1575

SOUTHERN CALIFORNIA JOINT BOARD OF AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO

HICKS-PONDER COMPANY
Employer

and Case 28-RC-1639

SOUTHERN CALIFORNIA JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO
Petitioner

On June 12, 1968, Trial Examiner David E. Davis issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recom-

mending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a Supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner except as herein modified.

1. The Trial Examiner found, and we agree, that the Respondent violated Section 8(a) (1) of the Act by engaging in surveillance[2] of union meetings; by

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[1]The Respondent has excepted to certain credibility findings made by the Trial Examiner. It is the Board's established policy not to overrule a Trial Examiner's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). We find no such basis for disturbing the Trial Examiner's credibility findings in this case.

[2]Respondent maintained a log that contained unusual events occurring in the plant including matters pertaining to union activity. In finding that the maintenance of the log violated Section 8(a) (1) in that it was designed to inhibit Section 7 rights of employees the Trial Examiner inferred that the log if produced, would disclose evidence unfavorable to Respondent including

interrogating employees concerning union activities; by soliciting employees to withdraw their union authorization cards; and by emphasizing the futility of bargaining in a series of speeches to its employees.[3]

With regard to the speeches, employee Jaime testified that the employees were told that they should return their union cards because even if the Union came in the Company would not negotiate with them; that the benefits would remain the same, ". . . there would be no more money . . . and benefits"; that "when the Union asked for something that they were going to say no, no"; and "that there wasn't any Union who didn't make strikes." Employee Javier testified that the employees were told that "this Union can just ask, ask, ask, and we can refuse no"; and that ". . . the Union if it did win that all then we'd have . . . some representative to speak for us! that we would not be free to speak for ourselves, that somebody would do the talking for us, this is all we would gain." Employee Montana testified that the employees were told

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the identity of those persons engaged in union activity and all such events and conversations. As the record is silent with respect to the specific contents thereof, we find no basis for inferring Respondent's purpose in maintaining such a log. Under these circumstances we conclude that Respondent did not violate 8(a) (1) by maintaining said log.

[3] Without relying on the next to last paragraph in Section III E (including the cases cited in footnote 48) of the Trial Examiner's Decision and the various characterizations made by the Trial Examiner concerning the series of speeches given by Attorney Price and Plant Manager Bunch, we nevertheless find on the basis of his credibility resolutions that Respondent violated Section 8(a) (1) by soliciting employees to withdraw their union cards and by certain statements set out above that clearly indicated the futility of bargaining if the Union should be successful in becoming bargaining representative.

that ". . . if there was strikes, that they would replace the girls"; "that there would be violence and fighting among the girls themselves"; that ". . . the company itself did not have to agree to anything. That they would just say no and no and no to everything"; ". . . that the company did not have to agree to anything or negotiate with them"; "that they would say no, just to everything, that they didn't have to agree to nothing," ". . . that we already had what we wanted that any other benefits we weren't going to get"; "that the Union wouldn't do anybody any good if it went in there, because they wouldn't agree to anything . . ."; that ". . . where there was a Union, that there usually was strikes"; ". . . that the Unions would usually cause strikes whether the employees wanted them or not . . . ."; and ". . . that the girls were on strike, they would replace them." Employee Sanchez testified that the employees were told ". . . that the company didn't have to negotiate with the Union if they didn't want to, and they were going to say no, and whatever the Union said, they were going to say no"; ". . . that whatever was going to happen they would have to go on strike"; and "that when they went on strike they would have to be replaced." Employee Granio testified that the employees were told the Company was not going to deal with the Union; ". . . that now we were getting two weeks vacation, the Union came in we were only going to get one week"; and ". . . that we were going to be in some difficulties and fighting, that we didn't have before if the Union got in . . . ." Employee Rodriguez testified that the employees were told that ". . . if the Union came in, there would be a strike, because

there would also be people fighting, and they would be fighting among the people who signed the cards, and the people who didn't sign the cards. In other words there would be trouble in the factory." This unremitting effort on the part of Respondent clearly impressed on the employees that Respondent had decided in advance not to bargain in good faith with the Union as required by the Act and that the employees could achieve nothing by designation of the Union.

2. We also agree with the Trial Examiner's finding that Respondent suspended and subsequently discharged employee Josephine Jaime in violation of Section 8(a) (3) and (1) of the Act.[4]

3. The Trial Examiner found that Respondent suspended employee Theresa Javier in violation of Section 8(a) (3) of the Act. Because he concluded that employee Robles' version of the statement made by Javier did not constitute a threat, the Trial Examiner concluded that the reported threat was used as a pretext by Respondent to suspend Javier in order to discourage her and other employees from engaging in union activity. Thus, the violation turns on whether the Trial Examiner correctly construed Javier's statement to Robles.

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[4]Even if we found contrary to the Trial Examiner, that the alleged offense against Jaime constituted the offense of clipping, as defined in the company handbook, this would not in any way affect our agreement with his ultimate findings herein.

The evidence discloses that on the day of Jaime's discharge, Javier remarked to Robles that the latter seemed very happy because of this discharge and that Javier was going to "settle matters with" Robles. The parties stipulated that Robles testimony as to this statement would be corroborated by employees Eyre and Cordova. A discussion on the record then ensued among the various parties, the interpreter, and the Trial Examiner, in which the interpreter indicated that the phrase "settle matters with me," in the terminology of translating the Spanish idiom, means fighting and can be construed as a threat. Upon the entire record, we are convinced that the statement to which Robles testified is usually understood as a threat. Under these circumstances, the premise for the Trial Examiner's conclusion that such threat was a pretext for suspending Javier is removed. Accordingly, we find that the General Counsel has not sustained his burden of proof, and we shall dismiss the allegation of the complaint that Respondent suspended employee Javier in violation of Section 8(a) (3) of the Act.

4. With respect to the Trial Examiner's remedial order, we are of the opinion that the circumstances of this case do not justify a departure from our normal period of posting or from the eligibility list requirements as set out in *Excelsior Underwear Inc.*, 156 NLRB 1236. We shall amend the Order accordingly.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations

Board adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and hereby orders that the Respondent, Hicks-Ponder Company, Yuma, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. Delete paragraphs 2(b) and (d) of the Trial Examiner's Recommended Order relettering the paragraphs therein accordingly and delete the tenth and eleventh indented paragraphs (which deal with Theresa Javier) of the Notice attached to the Trial Examiner's Decision.

2. In paragraph 2(f) of the Trial Examiner's Recommended Order delete "120 consecutive days" and substitute therefor: "60 consecutive days".

3. Add the following as the last indented paragraph of the Notice attached to the Trial Examiner's Decision:

> WE WILL NOT solicit our employees to withdraw their union authorization cards.

IT IS FURTHER ORDERED that the election held on July 28, 1967, among Respondent's employees be, and it hereby is, set aside, and that Case 28-RC-1639 be, and it hereby is, remanded to the Regional Director for Region 28 for the purpose of conducting a new election at such time as he deems that circumstances permit the free choice of a bargaining representative.

IT IS FURTHER ORDERED that all allegations of the complaint not specifically found to be violations of the Act be, and they hereby are, dismissed.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate. The Regional Director for Region 28 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes

by Southern California Joint Board, Amalgamated Clothing Workers of America, AFL-CIO.[5]

Dated, Washington, D.C. Jan 9, 1969.

Frank W. McCulloch,
Chairman

John H. Fanning,
Member

Gerald A. Brown,
Member
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

[5]An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 28 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27177

Summary Calendar

HICKS-PONDER COMPANY,

Petitioner-Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross Petitioner.

Petition to Review a Decision and Order of the National Labor Relations Board and Cross-Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

(March 25, 1970)

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

PER CURIAM: We have concluded on the merits that oral argument is unnecessary in this case. Accordingly, we have directed the Clerk to place the case on the Summary Calendar and to notify the parties of

this fact in writing. *See Huth v. Southern Pacific Co.*, 5 Cir. 1969, 417 F.2d 526; *Murphy v. Houma Well Service*, 5 Cir. 1969, 409 F.2d 804; 5th Cir. R. 18.

The National Labor Relations Board found that the Hicks-Ponder Company violated section 8(a) (1) of the National Labor Relations Act, 29 U.S.C. § 158(a) (1), by interfering with, restraining and coercing its employees in the exercise of their section 7 organizational rights. It also found an (8a) (3) and (1) violation in the discriminatory discharge of employee Josephine Jaime. The question before us, again, is whether substantial evidence on the record taken as a whole supports the findings. *See NLRB v. Monroe Equipment Co.*, 5 Cir. 1968, 392 F.2d 599.

There is ample evidence to support the Board on the first violation. The second is complicated in that several of the relevant witnesses gave evasive testimony. Apparently none presented a completely accurate and detached statement of what occurred. But on the basis of the record we are unable to say that the Trial Examiner — and the Board in affirming him — made erroneous credibility determinations.

Consequently, we ENFORCE the order of the Board.

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

HICKS-PONDER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 27,177

JUDGMENT

Before: WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

THIS CAUSE was submitted to this Court on petition to review, and a cross-application for enforcement of, an order of the National Labor Relations Board dated January 9, 1969, against Hicks-Ponder Company, its officers, agents, successors, and assigns. The Court having carefully considered the briefs and the transcript of record filed in this cause determined the case appropriate for summary disposition without oral argument. On March 25, 1970, the Court handed down its opinion denying the petition to review and granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Hicks-Ponder Company, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: Apr 29, 1970

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27177

Summary Calendar

HICKS-PONDER COMPANY,
Petitioner-Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

Petition to Review a Decision and Order of the National Labor Relations Board and Cross-Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(April 15, 1970)

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regu-

lar active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 282

HICKS PONDER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B2) is reported at 431 F. 2d 538. The Board's decision and order (Pet. App. A1-A9) are reported at 174 NLRB No. 12.

JURISDICTION

The per curiam order of the court of appeals (Pet. App. C-D) was rendered on March 25, 1970. A motion for rehearing was denied on April 15, 1970, and judgment was entered by the court of appeals on April 29, 1970. The petition for a writ of certiorari was filed on June 18, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the company discharged an employee for her union adherence rather than for cause.

2. Whether the court of appeals exceeded its authority in enforcing the Board's order without hearing oral argument.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

STATEMENT

In January 1967, Southern California Joint Board of Amalgamated Clothing Workers of America, AFL-CIO (the "Union"), began an organizing drive at the Yuma, Arizona, plant of Hicks-Ponder Company (the "Company"), a corporation engaged in the manufacture of sporting apparel. On May 26, 1967, the Union petitioned for an election and one was held on July 28, 1967, which the Union lost. The Union filed

objections to the election and also unfair labor practice charges against the company. On November 9, 1967, the election case and the unfair labor practice case were consolidated for hearing before a Trial Examiner (S.A. 11–12, 16–17).[1] As a result of that hearing, the Trial Examiner found that the Company had engaged in certain unfair labor practices in violation of Sections 8(a)(1) and 8(a)(3) of the Act. The Board, in upholding the Examiner's Decision except as to one violation not material here,[2] found, *inter alia*, that the Company had discriminatorily suspended and subsequently discharged employee Josephine Jaime; accordingly, it ordered her reinstatement with backpay. (Pet. App. A 5; S.A. 35). The court of appeals enforced the Board's order *per curiam*, having "concluded on the merits that oral argument is unnecessary in this case" (Pet. App. B1–B2). A petition for rehearing was denied (Pet. App. D1–D2).

Petitioner here contests only the finding that its discharge of employee Jaime was unlawful. The evidence relating to that aspect of the case is summarized below:

Jaime began her employment with the Company early in 1965 as a seamstress. Her job consisted of sewing pockets on Army pants (S.A. 26), which were

[1] "S.A." references are to the Supplemental Appendix containing the Trial Examiner's decision and "R." references are to the transcript of the testimony before the examiner printed for the court of appeals proceeding.

brought to her sewing machine in bundles, each containing three dozen pants. Each bundle carried a work ticket which, on completion of that bundle, was to be detached and pasted on a piece of paper known as a "gum sheet." Near the end of the day, the employees' gum sheets were signed by the respective employee and collected by the supervisor. As salaries were fixed on a piece-work basis, the number of work tickets pasted on a gum sheet determined the amount each seamstress earned. (S.A. 26; R. 36, 40–41).

Employee Jaime noticed, after following the above procedure for some time, that other employees were pasting work tickets on their gum sheets before completing the bundle on which they were working, and she began to do the same thing. Her first supervisor, Marie Luera, agreed that she could follow this practice every day except Friday, when she would be required to finish work on a bundle before pasting the ticket on her gum sheet. (S.A. 27; R. 36–37, 64–65). A subsequent supervisor, Sylvia Sims, however, criticized Jaime several times for pasting tickets on her gum sheet before completing work on a bundle. (S.A. 27; R. 190.)[2]

[2] On February 16, Jaime was officially reprimanded for "clipping tickets and *not completing* bundle" (emphasis added), and was warned that if similar incidents occurred in the future, the Company would discharge her (S.A. 27, R. 38–39, 308). On March 14, she was warned by Gene Williamson, assistant plant manager, not to take "tickets from bundles before she sewed them" (S.A. 27; R. 308). However, thereafter, Williamson gave her permission to remove the work ticket and paste it on the gum sheet *when she started* working on the bundle (S.A. 27–28; R. 41–44).

On January 3, 1967, Jaime signed a union authorization card. About two weeks later, she had a discussion about unions with her supervisor, Sylvia Sims, and was told that they caused strikes and fights among the employees. (S.A. 26; R. 30–32.) Thereafter around June or July 1967, the evidence shows that she attended a number of union meetings (S.A. 26; R. 34).

On July 26, 1967, at about 3:15 p.m., Jaime was called to a meeting of employees on Company time to hear a speech by Company counsel Price.[4] As Jaime entered the meeting room, she saw Plant Manager Bunch hand a note to an employee to give to Price. The note fell to the floor and Jaime picked it up. She noticed that there were two names written on the paper, her own and that of employee Lupe Robles (S.A. 28–29; R. 46–47). The note stated that Jaime had told Robles that "they" would "beat her up" if Robles voted against the Union (S.A. 30; R. 306). Jaime immediately asked Price a number of questions about the content of the note and suggested he speak to Robles about it.

Price then began the meeting and told the assembled employees, without mentioning any names, that one employee allegedly threatened another over the latter's failure to support the Union and that this sort of threat took place "quite often" during union organizing drives (S.A. 29, 32; R. 151–152). During his speech, Price declared that the employees might as well return their union cards, since the Company

[4] Management made a total of 37 speeches to assembled employees during the campaign (S.A. 37).

would say "no, no, no" to any Union requests for additional benefits (S.A. 29, 32; R. 49). He also stated that the Union would call a strike to back up its proposals for increased benefits. At this point, Jaime contradicted Price by stating that Union organizer Robertson had said that the Union would not call a strike. Price replied that there was no such thing as a union that did not call strikes. (S.A. 29; R. 49–51.) Price's speech ended at about 4:15, the employee's scheduled quitting time (R. 52).

At the time she was called to the meeting, Jaime had completed three bundles and was about halfway through her fourth. Fully expecting to finish the fourth bundle before the 4:15 quitting time, she had pasted the work ticket for the bundle on which she was working on her gum sheet.[5] Sometime during the speech, Sims had collected the gum sheets of the various operators, including Jaime; she signed Jaime's name to her gum sheet. Jaime attempted to find her gum sheet at 4:15, but was unable to do so, and went home. (S.A. 28, 29; R. 45, 52.) At about the same time, Sims showed Jaime's gum sheet to Assistant Plant Manager Williamson, who in turn showed it to Price. Bunch, Williamson, and Price all proceeded to Jaime's work station and inspected it. (S.A. 34; R. 149–150, 185–186, 263–264.)

[5] Petitioner conceded in the court below (brief, pp. 13–14) that it was no offense to paste a label before completing a bundle. This was common practice for employees at the plant and management had acquiesced in this practice as long as the employees reasonably could expect to finish the bundles before the end of the day (S.A. 28; R. 79–81, 91–92, 119–120, 123, 203–204).

When Jaime reported to work the following morning, July 27, she could not find her timecard. She reported to Personnel Director Daniels, who took her to the office, where Williamson and Daniels asked her about the alleged threat to Robles. Jaime denied the threat and requested several times that Robles be brought to the office. Robles was finally called to the office and, in Jaime's presence, stated that Jaime had told her that she would be fired if she did not join the Union.[6] Daniel then sent Robles back to work, and accused Jaime of pasting work tickets for *five bundles* on her gum sheet the previous day although she had completed fewer than four bundles; he told her that she was being placed on indefinite suspension (S.A. 30; R. 52–55). In fact, the credited evidence shows that Jaime had pasted work tickets from only four bundles on her gum sheet and was working on the fourth bundle when called to the meeting (S.A. 28, 34; R. 45, 97, 71–72).[7]

A few days later, Jaime was notified at home that Plant Manager Bunch wanted to see her. Jaime re-

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[6] At the Board hearing, Jaime denied threatening Robles. Robles did not testify about this incident and Jaime's uncontradicted testimony was credited. Petitioner does not claim that the alleged threat to Robles was one of the causes of Jaime's dismissal. (S.A. 30–31; R. 28.)

[7] At the Board hearing, the Company did not produce Jaime's gum sheet for July 26, explaining that it had been inadvertently destroyed while in the Company's possession. The Company's explanation for this failure to produce the gum sheet was specifically discredited by the Trial Examiner, who also discredited Company testimony that Jaime had pasted five tickets on the gum sheet and credited Jaime's testimony that she had pasted only four (S.A. 24–25, 34, 44).

ported to Bunch, who told her that she was discharged. Jaime told Bunch that other girls were doing the same thing without penalty. Bunch replied that when he learned their identities, he would fire them also. (S.A. 30; R. 55–57).

ARGUMENT

The decision of the court of appeals is correct and is fully supported by substantial evidence on the record taken as a whole (Pet. App. B–2). There is no basis for further review.

1. Petitioner contends here, as it did below, that the findings of the Board on the issue of Jaime's discharge are not supported by substantial evidence. By presenting the question in terms of a misapplication by the court of appeals of the standard applied in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, petitioner seeks a second examination of the record—a request that is both inappropriate and unwarranted.

Nowhere has petitioner demonstrated that the decision below was not based on a thorough review of the entire record. There is the unsupported suggestion that the court of appeals looked only to the credible testimony of employee Jaime (Pet. 8–9). Yet, the enforcement order itself states that "*several* of the relevant *witnesses* gave evasive testimony." (Emphasis added.) There is the allegation that the court below disregarded certain documentary evidence—*i.e.* time cards (Pet. 7)—which petitioner asserts conclusively refute the Trial Examiner's finding that Jaime was discharged a few days before the election. However, while formal

discharge did not occur until August 1, 1967, the time cards do indicate that Jaime's last day of work was July 26th, two days prior to the Union election.[8] Petitioner does not dispute that Jaime's absence from work thereafter was due to her indefinite suspension by the Company. Finally, petitioner alludes to other documentary evidence which it claims "in toto supported Petitioner's position" (Pet. 9) and asserts that "no mention of this evidence was made by the lower Court in handing down its decision." Suffice it to say that this same contention was briefed thoroughly by petitioner below (as were all the other points raised here) and thus could not have escaped consideration by the court of appeals.

2. Petitioner also contends (Pet. 10) that the court below abused its discretion by summarily disposing of the case without oral argument. This Court, however, has sanctioned the use of summary appellate proceedings in criminal cases, where no substantial issue of law is presented. *United States* v. *Johnson,* 327 U.S. 106, 113; *Carafas* v. *LaVallee,* 391 U.S. 234, 242; *Garrison* v. *Patterson,* 391 U.S. 464, 466. It clearly follows that such proceedings are appropriate in civil cases where, as here, no substantial issue is presented. See, *e.g., Mercado* v. *Commins,* 322 U.S. 465, 471.

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[8] Petitioner states that the government brief below conceded that the Trial Examiner's decision was premised on an erroneous finding that "(the discharge) occurred on July 24" (Pet. 7). In fact, our brief below (a copy of which has been filed with the Clerk of the Court) refers in this connection only to the "events" occurring on July 26, directly preceding Jaime's indefinite suspension which the Trial Examiner mistakenly stated took place on July 24.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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